

bitrate of its DTV transmissions on a time-of-day basis. BellSouth's headends and transport network are constructed to receive analog or digital content feeds, combine them together with additional locally generated content, and carry the combined content to the subscriber's home. All digital video content is received or encoded within a range of approximately 4 to 6 Mbps. It has been suggested, however, that a broadcaster might use its 6 MHz of digital spectrum to transmit up to five standard definition channels during the day (representing 4 Mbps each or 20 Mbps total) and switch to one channel of HDTV (representing 19.2 Mbps) when broadcasting popular prime-time programming. Because the channel combining and multiplexing process represents one of the most carefully tuned elements of a BellSouth cable system, the broadcaster's one channel of HDTV will be unviewable unless BellSouth's engineers retune the system at the precise moment when the broadcaster switches from five channels to one. The costs of such *ad hoc* retuning increase exponentially if multiple broadcasters change source or bitrate multiple times a day for different types of programs. Moreover, the only economically and technically feasible way to fully accommodate all broadcasters in this situation is to reserve a maximum amount of bandwidth for DTV at all times. Since a good portion of that bandwidth will be unused at various times throughout the broadcast day, this is a wholly inefficient option that only adds to the already substantial costs that would be imposed by a DTV carriage requirement.

4. *Electronic Program Guides.*

At paragraph 27 of the *NPRM*, the Commission observes that "electronic program guides [EPGs] and other interactive set top features may not work with [digital] signals that are not

processed by the set top box.” This is exactly the case with respect to BellSouth’s cable systems. BellSouth’s headends and STBs support a variety of different EPGs and interactive applications, ranging from the traditional analog “passive” channel that simply lists channels, networks and current programs to digital interactive program guides with full search and sort capabilities. Each of the EPGs that are available on BellSouth’s systems has been precisely configured to operate with the specific STB operating system and headend servers that BellSouth chooses to deploy in a particular market. At the present time, BellSouth does not believe that there is any viable technology available that would generically support any broadcaster-supplied EPG or data service that has not been specifically designed to operate with BellSouth’s systems.

5. *Copy Protection.*

Finally, the Commission asks whether it should explore the issue of copy protection, noting that STBs may be configured to assist program suppliers in providing copy protection to their programming.^{55/} BellSouth wishes to emphasize that this is a highly complex technical issue that is best left to private industry groups. For instance, any possible implementation of copy protection is highly dependent upon how digital broadcast content is carried. Where a cable system merely passes the digital signal through the STB without alteration, the cable system has no knowledge of the content of the digital video stream, nor is it aware of any restrictions placed on the digital video stream by the program owner. In addition, the MVPD would not actively “output” the stream other than to direct it to a different consumer device. Thus, in the “passthrough” scenario, implementation of copy protection solutions clearly is not within the

^{55/} *NPRM* at ¶ 30.

purview of the cable operator, and is more appropriately the responsibility of digital television manufacturers, not the Commission. This is equally true in the "translation" scenario (*i.e.*, where the digital signal is converted from VSB to QAM modulation, with a possible reduction in bitrate and picture resolution to match system and STB capabilities), since even there copy protection for selected programming would be problematic due to the lack of a defined method of identifying which programs are to be restricted, and when restrictions are to be engaged and disengaged for content that is not originated or controlled by the MVPD. Finally, absent any agreement on a standard digital copy protection method, it is impossible to know whether existing or future cable television systems will be able to support a federally-imposed copy protection requirement.^{56/}

IV. VOLUNTARY AGREEMENTS ARE THE MOST EFFECTIVE MECHANISM FOR LAUNCHING CABLE CARRIAGE OF DTV SIGNALS IN AN ORDERLY MANNER.

Given the substantial legal and technical difficulties associated with imposing DTV must-carry on cable overbuilders, BellSouth submits that the Commission should avoid adoption of such a requirement at this time. The Commission must not lose sight of the fact that BellSouth and other cable overbuilders operate in a fully competitive environment, and thus have every incentive to carry DTV signals if that is what subscribers demand. Any overbuilder that fails to do so risks the ultimate sanction of losing subscribers to its competitor. It is for this very reason

^{56/} Current copy protection methods (*e.g.*, Macrovision) are designed to operate in conjunction with the analog output of the STB. Such analog output would not exist in the digital "passthrough scenario," and may not exist in the translation scenario where 1394 "firewire" is used to deliver a digital carrier to a consumer device attached to the STB (*e.g.* a digital video deck).

that competition created by cable overbuilds produces exactly what the Commission has been trying to achieve via regulation since passage of the 1992 Cable Act, *i.e.*, better prices, improved customer service, and enhanced system capabilities.^{57/} There is every reason to believe that competition will be an equally effective surrogate for regulation where carriage of DTV signals is concerned.

Furthermore, BellSouth's private efforts to work cooperatively with local broadcasters have demonstrated that BellSouth is capable of addressing DTV carriage issues without government regulation. Indeed, there are indications that incumbent cable operators, who are the intended targets of must-carry, are successfully negotiating voluntary DTV carriage agreements with the broadcast industry.^{58/} Clearly, it is far more efficient and therefore consistent with the public interest for the Commission to allow these negotiations to run their course *before* adopting another complex layer of carriage regulations that the marketplace may render unnecessary.

BellSouth notes, however, that any reliance on marketplace forces in this proceeding must be tempered by a recognition that incumbent cable operators still retain a stranglehold over distribution of multichannel video programming in local markets, and thus hold substantial leverage over local broadcasters during retransmission consent negotiations. Accordingly, for the reasons set forth below, BellSouth urges the Commission not to eliminate its rule prohibiting

^{57/} See *Fourth Annual Report*, 13 FCC Rcd at 1130-40.

^{58/} See, *e.g.*, Albiniak, "Hindery Sees DTV Deals Before Fall," *Broadcasting/Cable*, at 36 (July 27, 1998).

exclusive retransmission agreements between incumbent cable operators and local broadcasters.^{59/}

When the Commission first prohibited exclusive retransmission consent agreements in its 1993 *Must-Carry R&O*, it specifically cited the concerns that led Congress to adopt the program access provisions of the 1992 Act, and concluded that it was appropriate to extend the same nonexclusivity safeguards to television broadcast signals, so that incumbent cable operators could not prevent their competitors from having full and fair access to local broadcast programming.^{60/} That conclusion clearly has withstood the test of time: it is a matter of public record that BellSouth and other alternative MVPDs continue to have considerable difficulties obtaining cable programming on reasonable terms and conditions, and that these difficulties are directly attributable to the control incumbent cable operators hold over distribution of programming in local markets.^{61/} Since the program access provisions of the 1992 Cable Act only apply to satellite-delivered cable programming, and thus do not encompass over-the-air broadcast programming, the exclusivity prohibition in the Commission's retransmission consent rules is the *only* regulatory safeguard that prevents incumbent cable operators from similarly

^{59/} See *NPRM* at ¶ 38.

^{60/} *Must-Carry R&O*, 8 FCC Rcd at 3006.

^{61/} Programming services which refuse to sell to cable's competitors include Fox News, MSNBC, Game Show Network, Eye on People, Home & Garden Television, and TV Land. Letter from William E. Kennard to Rep. Billy Tauzin, Responses to Questions at 1 (Jan. 23, 1998). The Commission has advised Congress that "[i]t is probably fair to say that the general conclusion is that any analysis [of the program access problem] should focus on the source of any market power involved (*the absence of competition at the local distribution level*) rather than on vertical integration itself." *Id.*, Responses to Questions at 3 (emphasis added).

using their control over local distribution to coerce local broadcasters into denying retransmission consent to alternative MVPDs. Given that the program access environment generally remains as unfavorable as ever to cable's competitors, there simply is no sound public policy for the Commission to worsen the problem by allowing incumbent cable operators and local broadcasters to enter into exclusive retransmission consent contracts.

Furthermore, it is by no means a stretch to suggest that local broadcasters would be willing to accommodate an incumbent cable operator's demand for exclusivity if given the opportunity to do so. *Indeed, during retransmission consent negotiations NBC and CBS have given incumbent cable operators exclusivity with respect to the MSNBC and Eye on People cable networks, respectively.* But for the Commission's prohibition on exclusive retransmission consent contracts, NBC and CBS could also have given incumbent cable operators exclusivity with respect to their off-air network programming as well. Given the devastating impact that such exclusivity would have on cable's competitors, there is every reason to believe that cable operators would demand and receive exclusive retransmission consent agreements with NBC and CBS as a *quid pro quo* for continued carriage of the MSNBC and Eye on People cable network and/or NBC and CBS broadcast programming. Again, retention of the exclusivity prohibition is the only regulatory safeguard that prevents this result.

Finally, the Commission asks for comments on whether elimination of the prohibition would hasten or slow down the transition from analog broadcasting to DTV.^{62/} BellSouth submits that eliminating the exclusivity prohibition would slow down the DTV transition, since

^{62/} NPRM at ¶ 38.

a cable operator who demands and receives exclusivity effectively denies a broadcaster access to all subscribers served by competing providers. Since the economic viability of DTV is tied to distribution of DTV signals to the maximum number of homes, any cable operator behavior which precludes that distribution necessarily lengthens the time frame within which DTV will reach profitability, thereby requiring local broadcasters to retain their analog channels for longer periods of time. Moreover, incumbent cable operators clearly will have more incentive to provide DTV to their subscribers more quickly in a fully competitive environment where all MVPDs have the same ability to obtain DTV carriage rights through the retransmission consent process.

Simply stated, BellSouth's cable overbuild service cannot compete if BellSouth is denied access to local broadcast programming, and there otherwise is no reason for the Commission to retreat from its earlier conclusion that exclusive retransmission consent contracts are anticompetitive and not in the public interest. BellSouth thus urges that the Commission's prohibition on exclusive retransmission consent contracts be retained.

V. CONCLUSION.

BellSouth fully agrees that DTV holds great promise for consumers, and will continue to work cooperatively with local broadcasters to ensure that the benefits of digital television are delivered to subscribers as quickly and efficiently as possible. In a fully competitive environment, this is the optimal mechanism for achieving the Commission's legal, technical and economic goals in this rulemaking. BellSouth thus urges the Commission to remain on its pro-

competitive, deregulatory course and refrain from imposing any DTV must-carry obligations on cable overbuilders at this time, and to retain its prohibition on exclusive retransmission consent agreements as requested above.

Respectfully submitted,

**BELLSOUTH CORPORATION
BELLSOUTH INTERACTIVE MEDIA
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October 13, 1998

Exhibit 1



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September 15, 1998

VIA FAX (303) 661-9199
AND U.S. MAIL

Mr. William T. Schleyer
Chairman-OpenCable
Working Teams
Cable Television Laboratories, Inc.
400 Centennial Parkway
Louisville, CO 80027-1266

Dear Mr. Schleyer:

BellSouth Entertainment, Inc. (BEI) operates both franchised cable systems and wireless cable (i.e., MMDS) systems in the southeastern United States, and as such has a significant interest in industry standards development efforts related to enabling the commercial availability of navigation devices. As you know, the Federal Communications Commission (FCC) released a Report and Order in CS Docket No. 97-80 ("Order") on July 1, 1998 that establishes the rules for the commercial availability of "navigation devices" and an ambitious timetable for achieving compliance with those rules. The FCC decided to maintain its reliance on voluntary standards development and in the Order specifically acknowledges the importance of the work of your OpenCable project in meeting the cable equipment standards development requirements of the Order. The Commission also made it very clear that this standards-setting process "must provide an opportunity for a range of interests to participate", and indicated that it would revisit its reliance on such a process if it learns that interested parties such as BEI have been excluded from participation.

The purpose of this letter is to formally request that BEI be allowed to participate in the OpenCable standards-setting process without further delay. I understand that your Board recently voted to exclude competitors of incumbent cable operators such as BEI from membership and, on that basis, CableLabs refused our verbal request to participate directly in the OpenCable process. Given the FCC's support for inclusive, rather than exclusive participation, we request clarification from you as to what alternative meaningful opportunity CableLabs will provide cable operators such as BEI.

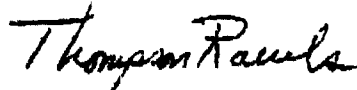
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As you know, the OpenCable standards development effort requires close collaboration with the industry's cable equipment vendors; the same vendors we rely upon to serve our equipment needs. Inasmuch as this process addresses a variety of technical issues that have competitive implications regarding what specific technologies and functionalities will be supported by the standard and at what cost, it is essential that we participate in the process now. We have no interest in delaying the process or undermining the progress that may have already been achieved. Given the time sensitivity of this undertaking, I would appreciate receiving a written reply to this request as soon as possible.

Sincerely,



Thompson T. Rawls

cc: Scott Swix

bcc: Ray Vogel
Bob Frame
Will Matz
Rick DeTurk
Karen Possner-D.C.